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No. 82-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

G. CECIL HARTLEY, and
TRAVIS DELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners, G. CECIL HARTLEY and TRAVIS DELL,[1] pursuant to Rule 22.5 of this Court, respectfully file this brief in reply to the Brief for the United States in Opposition filed in this case on December 27, 1982.

Petitioners herein join in the Reply Brief filed by Treasure Isle, Inc. dated January 7, 1983.

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[1] As required by Rule 28.1 of this Court, Petitioners state that their corporate relationships as stated in their Petition for Writ of Certiorari are currently accurate.

In its brief, the Government on page 6, footnote 8, contends that the joinder by Petitioners in Treasure Isle's Petition "even if meritorious, would not impugn the validity of their convictions." The aforesaid statement in the Government's brief is not supported by any citation of authority or argument and as a matter of fact is inaccurate. The allegations of the RICO Count set forth "alleged facts" that are not otherwise set out in any other Count in the Indictment. The RICO Count was the vehicle under which the Court admitted a substantial amount of evidence that would not otherwise have been admissible under the other Counts of the Indictment. Accordingly, a determination that the RICO Count should have been dismissed and a corresponding determination of the exclusion of the evidence admitted by virtue of the existence of that Count would require reversal and remand for new trial on all Counts insofar as Petitioners herein, are concerned.

As it relates to the Petitions filed in behalf of Hartley and Dell, the Government contends that their "claims are without factual or legal merit." (Br. in Opp., at 10). Petitioners submit that these contentions are misleading. In support of Petitioners' contentions they submit the following:

WHAT DID THE GOVERNMENT DO?

1. Since before 1970 the Government contracted with Treasure Isle to purchase frozen, breaded shrimp.

2. The Government contract furnished the specifications that set out the criteria for the quality of the product acceptable to the Government and the criteria for establishing the price for said product. Different prices were charged by Treasure Isle for different sizes, with the larger shrimp being the most expensive. The only criteria for setting of the price was size.

3. The shrimp were inspected in-plant by military inspectors.

4. In December, 1977, the Government became concerned that the in-plant inspection process was being subverted and that as a consequence it was not receiving the quality of shrimp called for in the contract and was paying for large shrimp, when as a matter of fact it was receiving small shrimp.

5. The production of frozen, breaded shrimp sold to the military was on a continuous basis, but for the purposes of identification the production was broken into lot numbers. In December of 1977 the in-plant military inspectors specially marked boxes from lots F-6869 and F-7008, so that when that product was received at a military installation a determination could be made whether or not the inspection process had been subverted.

6. When the shipment including lots F-6968 and F-7008 reached its destination, the Department of Investigative Services, the Criminal Investigative Agency for the Department of Defense, took charge of the product and had it inspected to determine whether it satisfied the contract specifications. The two lots were tested and re-tested five or six times over the next six months with varying results. The Government ultimately contended that the product was non-conforming in regard to size (count per pound) and percentage of breading and certain other attributes.

7. The Government continued to purchase frozen, breaded shrimp from Treasure Isle through approximately July, 1979.

8. As a part of the continuing criminal investigation by the Government, the Department of Investigative Services in January and April, 1979 tested Treasure Isle's product at a

military installation and found that the product conformed to the contract in all respects. This product was produced under the same conditions as the product in lots F-6968 and F-7008.

9. In mid-1979, Treasure Isle learned that it was the subject of a criminal investigation, and a written demand was made upon the Government in June, 1979 to preserve all Treasure Isle product on hand in order to permit it to be independently tested. In June, 1979 the Government had thousands of pounds of Treasure Isle product on hand.

10. Unbeknownst to Petitioners and Treasure Isle, the Government consummed all of the product that had been on hand in June, 1979 (and thereafter purchased), except for the product in lots F-6968 and F-7008.

11. The Government mishandled the frozen breaded shrimp that were a part of lots F-6968 and F-7008 by repeatedly allowing the product to thaw and thereafter refreezing it. As a consequence, the product could not be independently tested for size, breading percentage and certain other characteristics that the Government claimed constituted evidence of the fraud perpetrated upon it.

12. The Government offered Treasure Isle the opportunity to test lots F-6968 and F-7008 after the product had been mishandled, which offer was rejected since testing at that point would have served absolutely no purpose.

WHAT DID THE DEPARTMENT OF JUSTICE DO?

1. The Department of Justice controlled and directed the criminal investigation of Treasure Isle from its inception through the date of the return of the Indictment.

2. A special attorney employed by the Department of

Justice made the Grand Jury presentation, and prepared the indictment returned by the Grand Jury.

3. The special attorney employed by the Department of Justice received Treasure Isle's June 1979 letter requesting that the product on hand be retained for the purpose of testing and *took no action* in response to that request.

4. The special attorney with the Department of Justice acted as lead counsel during the trial of Petitioners.

WHAT DID THE TRIAL JUDGE DO?

1. The Trial Judge denied Petitioners' Motion to Dismiss, Suppress and in Limine by virtue of which Petitioners sought to exclude the Government's presentation of its test results of F-6968 and F-7008. The Court found that:

> ". . . a substantial portion of these lots were preserved and have been made available to the Defendants for testing. However, due to subsequent thawing and refreezing, and normal deterioration, the shrimp from these two lots cannot be tested for some of the characteristics which are pertinent to this case, such as, breading percentage and count per pound. All other shrimp produced by Treasure Isle and sold to the United States Government has been consumed or, in the words of the Defendants in this case, systematically destroyed . . ."
>
> "The Court must agree with Petitioners in this case that the *missing shrimp is both material and subject to varying expert opinion.* While the consumption of the shrimp was 'intentional,' there is no evidence that there was an improper governmental motive in this case . . ." (Emphasis added)

2. Over objection, the Trial Judge permitted the Government to present to the jury the results of its testing of lots F-6968 and F-7008.

3. The Trial Judge permitted the Government to impeach the military inspectors who had tested the Treasure Isle product and determined that it conformed to the contract specifications. That product was consumed by the Government after the testing was completed, and therefore was unavailable for independent testing by Treasure Isle.

WHAT DID THE JURY DO?

1. After a day and one-half of deliberations, the jury sent a note to the Trial Judge stating that it was *"hopelessly deadlocked"* and could not reach a verdict (LXXVI, p. 7964). The note further explained that a portion of the jury *"rejects all prosecution testimony as untrue"* and *"a fabric of lies"* (LXXVI, p. 7964).

2. The jury ultimately convicted Petitioners and Treasure Isle of all counts charged in the Indictment.

WHAT DID THE ELEVENTH CIRCUIT COURT OF APPEALS DO?

1. In the opinion affirming the Petitioners' convictions, the Eleventh Circuit required that the Defendants prove the Government's *"bad faith"* and its *"improper motive"* when the Government has mishandled, lost, consumed or destroyed material evidence, before the Court would grant relief from a verdict of guilty.

WHAT CONTENTIONS HAS THE SOLICITOR GENERAL MADE?

1. Insofar as the RICO Count set out in the Indictment is concerned, he contends that the Department of Justice did nothing wrong but that it will never again charge a corporation as a Defendant and as the "enterprise" within the meaning of RICO.

2. He contends that Petitioners Hartley and Dell were not prejudiced by the "improper" RICO charge in the Indictment.

3. He contends that Petitioners' claims "are without factual or legal merit." In footnote 15, page 13 (Br. Opp.) he contends that Petitioners failed to distinguish or even cite the case of *United States v. Augenblick*, 393 U.S. 348, 355-356 (1969) and that Petitioners' reliance on *Brady v. Maryland*, 373 U.S. 83 (1963) is misplaced.

ARGUMENT

Nowhere in the Government's Brief in Opposition are the conflicts that exist among the First, Second, Third, Fifth, Ninth, D.C. and Eleventh Circuits addressed. As a matter of fact, the cases cited by the Government on pages 13 and 14 in its Brief in Opposition clearly show that the conflicting appellate opinions also include one from the Tenth Circuit. *United States v. Baca*, 687 F.2d 1356 (10th Cir. 1982).

The First Circuit places the *burden of showing good faith on the Government rather than on the Defendant. United States v. Picariello*, 568 F.2d 22 (1st Cir. 1978).

In the Second Circuit there are two tests: *one that weighs the Government's culpability against the amount of prejudice to the Defendant, United States v. Miranda*, 526 F.2d 1319 (2nd Cir. 1975), and the second which *directs that sanctions will nor-*

mally flow against the Government irrespective of its motivations "unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the Defendant." United States v. Bufalino, 576 F.2d 446 (2nd Cir. 1978).

The Third Circuit holds that *"convictions may be permitted to stand only so long as the Government has made 'earnest efforts' to preserve crucial materials . . ."* and when the Government can show that *the loss was "harmless beyond a reasonable doubt." Government of Virgin Islands v. Testamark*, 570 F.2d 1162, 1165, 1167 (3rd Cir. 1978).

The Fifth Circuit, using an analogy drawn from the line of cases following *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), applied a constitutional due process standard and equated intentional non-preservation of evidence with illegal suppression. The Court required that the Government establish its earnest efforts to preserve the evidence, and it concluded that good faith on the part of the Government would excuse the loss of evidence. *White v. Maggio*, 556 F.2d 1352 (5th Cir. 1977). The Court cautioned that *"an exception for good faith loss of important evidence must not be allowed to swallow the discovery rules, and the burden of explanation of the Government must be a heavy one." Armstrong v. Collier*, 536 F.2d 72, 78 (5th Cir. 1976).

The test applicable to lost or destroyed evidence in the Ninth Circuit requires *a Defendant to show the Government's bad faith or that he was prejudiced before a conviction can be overturned. United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974). This position seems to have been reiterated in *United States v. Loudhawk*, 628 F.2d 1139, 1146 (9th Cir. 1979).

In the D.C. Circuit the Court will only apply the *"good faith exception"* in circumstances when the *Government has employed rigorous and systematic procedures designed to*

preserve all discoverable evidence." United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), and *United States v. Bryant*, 448 F.2d 1182 (D.C. Cir. 1971).

The Eleventh Circuit in *United States v. G. Cecil Hartley, et al.*, 678 F.2d 961 (11th Cir. 1982), *required the Defendant to prove the Government's bad faith and/or improper motive*, before it would consider the loss or destruction of evidence a Due Process violation sufficient to warrant reversal.

In the Tenth Circuit the Court seems to require a showing of bad faith or fraudulent purpose on the part of the Government before it will reverse a conviction. *United States v. Buca*, 687 F.2d 1356. In that case federal authorities did not destroy or participate in the destruction of the evidence; therefore, the Court did not deal with the question of who has the burden of proving the Government's impropriety and/or good faith.

Some of the cases cited rely upon *Brady*, supra, and its progeny and others rely upon the test set out in *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528 (1969). In the later case this Court noted that "the Government bore the burden of producing (the tapes) or explaining why it could not do so." *Id.* at 355-56. This Court has *never* required a *Defendant* to prove the Government's "bad faith" or "improper motive" when the Government has mishandled, lost, consumed or destroyed material evidence as is now required by the Eleventh Circuit. *United States v. Hartley, supra.*

CONCLUSION

There are sound legal reasons why this Court should exercise its discretion and grant certiorari to resolve the conflicts between the Federal Appellate Courts relating to: (1) who has the burden to establish the Government's good faith or bad faith and/or improper motive; (2) who has the burden to prove the

materiality of the lost or destroyed evidence; (3) who has the burden to prove whether a Defendant has been prejudiced, and what degree of prejudice must be established to warrant reversal of a conviction; (4) the extent to which the Defendant's right to test material evidence which has been lost or destroyed by the Government is protected by the due process clause of the Constitution; (5) the sanctions, if any, to be imposed on the Government when it has lost or destroyed material evidence that precludes a Defendant from independently testing that evidence; and (6) who has the burden of proving whether the Government has made an earnest effort to preserve material evidence.

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